IN THE

SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM 1896.

ALBERT F. HOLDEN, Plaintiff in Error. vs. HARVEY HARDY, Sheriff of Salt Lake County, Utah.	No. 655
and	
ALBERT F. HOLDEN, Plaintiff in Error. vs. HARVEY HARDY, Sheriff of Salt Lake County, Utah.	No. 658

IN ERROR TO THE SUPREME COURT

OF THE STATE OF UTAH.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT.

These cases involve the constitutionalty of the statute of Utah approved March 30, 1896, entitled

"An Act regulating the hours of employment in underground mines, and in smelting and ore reduction works." The statute is as follows:

"SEC. 1. The period of employment of working men in all underground mines or workings shall be eight (8) hours per day, except in cases of emergency where life or property is in imminent danger.

SEC. 2. The period of employment of working men in smelters and all other institutions for the reduction or refining of ores or metals shall be eight (8) hours per day, except in cases of emergency where life or property is in imminent danger.

SEC. 3. Any person, body corporate, agent, manager or employer, who shall violate any of the provisions of Sections I and II of this act shall be deemed guilty of a misdemeanor."

The plaintiff in error was convicted in the first case of a violation of Section I, upon the charge that he "unlawfully did employ one John Anderson to work and labor as a miner in the underground workings of the Old Jordan Mine * * for the period of ten hours each day * * and on the date aforesaid and continuously since said time has unlawfully required said John Anderson under and by virtue of said employment, to work and labor in the underground workings of said mine aforesaid for the period of ten hours each day, and that said employment was not in case of an emergency etc."

In the second case the plaintiff was convicted of a violation of Section II of said act.

In each case he was sentenced to pay a fine of $50.00 and costs and to imprisonment in the county jail for fifty-seven days or until said fine and costs

were paid. Having been committed to the custody of the sheriff, plaintiff in error filed a petition in the Supreme Court of Utah for a writ of *habeas corpus* which was denied, and the cases were thereupon brought to this Court by writ of error.

The assignments of error in the two cases present similar questions, and the cases may be considered together.

The assignments of error are based upon the claim that the statute in question is in violation of the United States Constitution, and that therefore the convictions were unlawful. These constitutional objections are presented and discussed in plaintiff's brief under three heads, viz:

"1st. The statute of Utah involved herein is in conflict with the Constitution of the United States, and is not a valid exercise of the police power of the State." (p. 6 of brief.)

"2nd. The statute in question abridges privileges and immunities of the plaintiff in error to which he is entitled as a citizen of the United States." (p. 21 of brief)

"3rd. This statute is also violative of the provisions of the Fourteenth Amendment, that no state shall deprive any person of life, liberty or property without due process of law, or deny to any person the equal protection of the laws." (p. 32 of brief).

In answering plaintiff's argument we will, so far as the similarity of the questions permit, follow the same order.

ARGUMENT.

RULES OF CONSTRUCTION.

Before taking up the various contentions of counsel we would call the attention of the Court to the well settled rules by which the constitutionality of a statute is determined.

A rule of construction in such cases that has been well settled by an unbroken line of able decisions of this and other Courts is, that when the constitutionality of a statute is questioned the presumption always exists in favor of the validity of the law until its unconstitutionality is shown *clearly and beyond doubt*, and if there be a doubt in the mind of the court it must be determined in favor of the validity of the statute.

"The right of the judiciary to declare a statute void and to arrest its execution is one which, in the opinion of the court, is coupled with a responsibility so grave that it is never to be exercised except in very clear cases. One department of the government is bound to presume that another has acted rightly. The *party who wishes us to pronounce a law unconstitutional* takes upon himself the *burden* of *proving beyond a doubt* that it is so."

Erie R. R. vs. Casey 26 Pa. St. 287.

Powell vs. Com. 114 Pa. St. at page 270.

"It has been truly said that the presumption is in favor of every legislative act, and that the whole

burthen of proof lies on him who denies its constitutionality."

Marshall, C. J. in Brown vs. Maryland 12 Wheat. 436.

"It is but a decent respect due to the wisdom, the integrity and the patriotism of the legislative body by which a law is passed, to presume in favor of its validity, until its violation of the constitution is *proved beyond all reasonable doubt.*"

Ogden vs. Saunders 12 Wheat. 270

"Only when it violates the constitution *clearly, palpably, plainly, and in such manner as to leave no doubt or hesitation in our minds.*"

Sharpless vs. Mayor 59 Am. Dec. 782.

"Every statute is presumed to be constitutional. The courts ought not to declare one to be unconstitutional unless it is clearly so. If there is doubt, the expressed will of the legislature should be sustained."

Munn vs. Illinois 94 U. S. 126.

To the same effect and approving the above language are the following:

State vs. Coal Company 36 W. Va. 835-838.
Penn. R. R. vs. Riblet 66 Pa. St. 164.
University vs. Barnard 57 Cal. 612.
Sinking Fund Cases 99 U. S. 718.
State vs. Ah Chew 40 Am. Rep. 490.
Fletcher vs. Peck 6 Cranch 87
Ah Lim vs. Territory 1 Wash. St. 159.
State vs. Addington 77 Mo. 110.
State vs. Laughlin 75 Mo. 147.
Humes vs. Railway 82 Mo. 230-232.
Leep vs. Railway 58 Ark. 414-415.
Newland vs. Marsh 19 Ill. 385.

That the law may seem unreasonable, oppressive

or absurd, or that there may be objections to its policy or expediency, is not sufficient to justify its judicial repeal. These are matters for which the legislature must shortly answer to its constituents who can correct them. It must be in direct conflict with some expressed prohibition of the constitution.

Mayor of New York vs. Miln 11 Peters 138.
Cooley vs. Const. Lim. 164.
Nathan vs. Alabama 8 How. 73.
Passenger cases 7 How. 402.
Sharpless vs. Mayor 21 Pa. St. 147-161-162,
Pattison vs. Yuba 13 Cal. 175-182.
Leonard vs. Wiseman 31 Md. 201.
Com. vs. McWilliams 11 Pa. St. 61-70.
Davis vs. State 3 Lea 376.
Varrick vs. Smith 5 Paige 160.
Williams vs. Commack, 27 Miss. 209.
Passenger cases 7 How. 287.
Ah Lim vs. Territory 1 Wash. St. 162.
People vs. Gillson 109 N. Y. 406.

ANSWER TO PLAINTIFFS CONTENTION.

Answering the objections of plaintiff in error in the order in which they are presented and discussed in the brief we say:

FIRST.

The first objection (page 6 of plaintiff's brief) is that the statute of Utah is in conflict with the Constitution of the United States, and is not a valid exercise of the police power of the state.

By this language we understand counsel to adopt the rule which is sustained by many decisions, viz: That if it is in exercise of the police power,—if it can reasonably be construed as a provision for the health,

safety or general welfare,—it will not be held invalid because of a conflict with the constitution.

Before subjecting the statute to the scrutiny necessary to decide whether it is a police regulation, a foundation must be laid by the person attacking the statute, by showing clearly that it is in conflict with the Federal Constitution.

To clear the way we would here call attention to plaintiff's claim, as we understand it from his brief. It is not claimed by him that it is in conflict with any of the powers expressly delegated to Congress, such as the regulation of interstate commerce, coinage of money, and the like. It is not claimed to have the effect of impairing the obligation of a pre-existing contract.

Indeed the only claim of a violation of a right protected by the Federal Constitution is briefly this: That as a citizen of the United States the plaintiff, Holden, is guaranteed the right to enter into any private contract he may choose if he can gain the consent of the other party to the contract; and that the State legislature is prohibited by the XIV Amendment from in *anywise* limiting the kind of contract he may enter into or regulating its terms or conditions in *any respect*.

This claim is presented by counsel under three heads but they all express the same idea and contention.

As these will be discussed in the order in which they are presented by plaintiff's brief, we will, under

this head, suppose that plaintiff has sustained the burden that rests with him and has pointed out the clause of the constitution which insures this right of exemption from legislative interference with the subject or terms of his contracts. And will take up with counsel the question of whether the subject of this Statute is within the scope of the police power.

While the burden here, as it is in pointing out the clause of the constitution violated, is with the plaintiff, to show that this statute does not relate to a subject within the police power, we feel that if the burden were the other way we might sustain it by reference to the facts surrounding its passage. Before referring to the citations in plaintiff's brief, we would call attention to these facts.

The decision of the Supreme Court of Utah which is a part of the record here shows that the industry which forms the subject of this statute—labor in underground mines and in smelters—is one of unusual danger to the health and safety of those employed therein.

The opinion of the Utah Supreme Court in the case at bar refers to some of the unhealthful features of underground mining in the following language, (See 46 Isac. Rep. at page 758, where this opinion is reported):

"The effort necessary to successful mining if performed upon the surface of the earth, in pure air

and in the sunlight, prolonged beyond eight hours, might not be injurious, nor affect the health of able bodied men. When so extended beneath the surface, in atmosphere laden with gas, and sometimes with smoke, away from the sunlight, it might injuriously effect the health of such persons. It is necessary to use artificial means to supply pure air to men laboring any considerable distance from the surface. That being so, it is reasonable to assume that the air introduced, when mixed with the impure beneath the surface, is not as healthful as the free air upon the surface. The fact must be conceded that the breathing of pure air is wholesome, and the breathing of impure air is unwholesome. We cannot say that this law, limiting the period of labor in underground mines to eight hours each day, is not calculated to promote health; that it is not adapted to the protection of the health of the class of men who work in underground mines."

And in the second case, referred to as the "Mill case," the Utah Court noticing some of the dangers connected with that industry say: (46 Pac. Rep. at pages 1105-1106.)

"The conditions with respect to health of laborers in underground mines doubtless differ from those in which they labor in smelters and other reduction works on the surface. Unquestionably, the atmospheric and other conditions in mines and reduction works differ. Poisonous gases, dust, and impalpable substances arise and float in the air in stamp mills, smelters, and other works in which ores containing metals, combined with arsenic or other poisonous elements or agencies, are treated, reduced and refined, and there can be no doubt that prolonged effort day after day, subject to such conditions and agencies,

will produce morbid, noxious, and often deadly effects in the human system. Some organisms and systems will resist and endure such conditions and effects longer than others. It may be said that labor in such conditions must be performed. Granting that, the period of labor each day should be of a reasonable length. Twelve hours per day would be less injurious than fourteen, ten than twelve, and eight than ten. The legislature has named eight. Such a period was deemed reasonable.

* * * *

The law in question is confined to the protection of that class of people engaged in labor in underground mines, and in smelters and other works wherein ores are reduced and refined. This law applies only to the classes subjected by their employment to the peculiar conditions and effects attending underground mining and work in smelters, and other works for the reduction and refining of ores. Therefore it is not necessary to discuss or decide whether the legislature can fix the hours of labor in other employments. Though reasonable doubts may exist as to the power of the legislature to pass a law, or as to whether the law is calculated or adapted to promote the health, safety, or comfort of the people, or to secure good order, or promote the general welfare, we must resolve them in favor of the right of that department of government."

That this is generally recognized as dangerous to health and safety of those so employed is also shown by the Act of Congress commonly known as the Utah Enabling Act, approved July 16, 1894. Sec. XII of that act donates 50,000 acres of land "for a miners hospital for disabled miners."

The Constitutional Convention of Utah, composed of those who were familiar with its risks and dangers, likewise recognize it as a subject requiring special attention, and by Art. XVI Sec. VI of the Utah Const. say that the "Legislature shall pass laws to provide for the health and safety of employees in * * smelters and mines."

Again by the acts of the Legislature both before and after the Constitutional Convention, in its various provisions concerning the inspection of mines, and since Statehood by appropriations and laws for miners hospitals.

The frequent mention by the courts of many states of mining as a proper subject for health and safety regulations, will be noticed hereafter.

The investigations of hospital records and health statistics concerning labor in mines and smelters, by the Legislature before the passage of this act; the general discussion of its merits and advantages, its approval by most mine owners and by all employees, the numerous petitions presented to the Governor to approve the act signed by many hundreds of miners and smelter employees and citizens of the state who were familiar with the dangerous character of the employment; the fact that experience of mining and smelter employers and employees showed that in those particular industries more labor could be done in a year when employees worked eight hours per

day than when they attempted to work ten hours per day;—are matters not appearing in the record, but were facts of which the court below very properly took notice as facts of general knowledge. The plaintiff made no claim and offered no testimony—expert or of other character—to show that ten hours of such work per day was not injurious to health etc. Under the rule adopted in cases cited by counsel, plaintiff might have made such showing if such were the facts.

The employment being one where it was so obviously apparent to the Court that long hours of labor will "soon exhaust the strength of the laborer and render him a permanent invalid" and a burden upon the public, it may be proper to test the statute by the definitions of the subjects of police regulation cited by counsel for plaintiff.

The first case cited by counsel is worthy of special consideration in that it contains an able discussion of the location of powers under the system of Government resulting from the adoption of the Federal Constitution. This case (Mayor of New York vs. Miln. 11 Peters 102) involved the constitutionality of an Act of New York providing certain regulations as to emigrants, and was designed to protect the State from the threatened burden of supporting the large number of poor people coming from foreign countries.

The defendant contended that the act of New York was unconstitutional as regulating foreign commerce.

(Page 130-131). The plaintiff contended that even if it affected commerce it was valid as a proper exercise of the police power which is not surrendered to congress.

The Court, by Barbour J., says (page 132). "If, as we think it be a regulation, not of commerce, but police, then it is not taken from the states." The court proceed with a discussion of what powers were surrendered and what retained by the states, and say "The powers reserved to the several states will extend to all the objects which in the ordinary course of affairs concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the state."

And quoting from 9 Wheat. 203, which concerned an inspection law say:

"They form a portion of that immense mass of legislation which embraces everything within the territory of the state, not surrendered to the general government, all which can be most advantageously exercised by the states themselves. Inspection laws, quarantine laws, health laws of every description, etc., etc."

The opinion reviews the two cases of Gibbons vs. Ogden, 9 Wheat. 1 and Brown vs. Maryland, 12 Wheat 419, showing that they came within the powers surrendered, viz: Regulation of commerce and taxing imports.

The Court holds that the N. Y. act was not such a

regulation of commerce as to be objectionable, but say: (page 138).

"But we do not place our opinion on this ground. We choose rather to plant ourselves on what we consider impregnable positions. They are these: That a state has the same undeniable and unlimited jurisdiction over all persons and things, within its territorial limits, as any foreign nation; where that jurisdiction is not surrendered or restrained by the constitution of the United States. That, by virtue of this, it is not only the right, but the bounden and solemn duty of the state, to advance the safety, happiness, and prosperity of its people and to provide for its general welfare, by any and every act of legislation, which it may deem to be conducive to these ends; where the powers over the particular subject, or the manner of its exercise is not surrendered or restrained, in the manner just stated. That all the powers which relate to merely municipal legislation, or what may perhaps, more properly be called internal police, are not thus surrendered or restrained; and that consequently, in relation to these the authority of a state is complete, unqualified, and exclusive * * * We would say, that every law came within this description which concerned the welfare of the *whole people* of the state, or *any individual* within it; whether it related to their rights, or their duties; whether it respected them as *men*, or as *citizens* of the *state;* whether in their public or *private* relations; whether it related to the rights of persons, or of property, of the *whole people* of the state or of *any individual within it;* and whose operation was within the territorial limits of the state, and upon the persons and things within its jurisdiction."

At page 141, the Court say that obviously the act in question was "passed with a view to prevent her

citizens from being oppressed by the support of multitudes of poor persons, who come from foreign countries without possessing the means of supporting themselves. * * * It is the duty of the state to protect itself from this evil. * * * We should, upon principle, say that it had the right to do so." And at page 142, "We think it as competent and as necessary for a state to provide precautionary measures against the moral pestilence of paupers, vagabonds, etc., as against the physical pestilence, etc."

The case of Stone vs. Mississippi 101 U. S. 814, decided in 1879, cited by counsel, is equally emphatic in its declaration that this power was retained by the states, and that it "extends to all matters affecting the public health or the public morals." At page 819, Waite, C. J. says: "No legislature can bargain away the public health or the public morals * * Government is organized with a view to their preservation and cannot divest itself of the power to provide for them. For this purpose the largest legislative discretion is allowed." And quoting from Chief Justice Marshall in 4 Wheat. 629: "That the framers of the Constitution did not intend to restrain states in the regulation of their civil institutions adopted for internal government, and that the instrument they have given us is not to be so construed." By this decision the Act of Miss. of 1870 revoking the charter granted the lottery company granted in 1867, was upheld.

Lake View vs. Rose Hill Cemetary, 70 Ill. 192.

Decided 1873.

Involves constitutionality of statute of Ill. limiting the ground which might be used by the cemetary

company. The State had granted a charter to the company in 1860 authorizing this company to purchase this ground and use same for cemetary purposes. The late Act sought to confine the company to a use of only a portion of the ground for such purpose. The court (four of the Judges) held that the later Act impaired the obligation of the contract created by the charter and was therefore unconstitutional; there being no necessity shown why for the public health the rights originally granted should be limited.

The minority of the Court (with whom the Chief Justice Breese and Craig J. concurred) held that it was the province of the Legislature to determine when the emergency arose, and that in the exercise of its police power it could change the charter provision for what, in its judgment was for the good of the public health.

Both opinions express, in similar language, the large scope of the police power.

Railroad vs. Husen, 95 U. S. 465.

Involved the validity of a statute of Missouri directly in conflict with the surrendered power to regulate inter-state commerce. The court holds that a power so *expressly surrendered* cannot be exercised by the state under the guise of a police regulation *except* in cases of "vital necessity;" and where such palpable conflict exists the court will retain the right

to inquire whether the vital necessity exists. As to the scope of the police power the Court quotes with approval the language of Judge Redfield in the case of Thorp vs. Railroad, 27 Vt. 149, and say: "It may exclude from its limits convicts, paupers, idiots and lunatics and *persons likely to become a public charge etc.*"

The Act of Missouri there in question prohibited the shipment into the state of any Texas cattle between March 1st and Nov. 1st of each year, whether they were in a healthy condition or not. The Court concludes that there was not such "vital necessity" for such law as to justify so violent an encroachment upon the power to regulate commerce which had been expressly surrendered to Congress, and therefore hold the statute void.

Thorp vs. Railroad, 27 Vt. 140.

Involved constitutionality of a statute of Vermont requiring railroad corporations to place a cattle guard at crossings. HELD to be a proper exercise of police power. Speaking of this power, Redfield J. says:

"It has never been questioned, so far as I know, that the American Legislatures have the same unlimited power in regard to legislation which resides in the British Parliament, except where they are restrained by written constitutions. That must be conceded, I think, to be a fundamental principle in the political organization of the American States. We cannot well comprehend how, upon principle, it shoud be otherwise. The people must of course, possess all legislative power originally. They have com-

mitted this in the most general and unlimited manner to the several State Legislatures, saving only such restrictions as are imposed by the constitutions of the United States, or of the particular State in question," (page 142 and 143). And at page 149,

"We think the power of the legislature to control existing railroads in this respect, may be found in the general control over the police of the country, which resides in the law making power in all free States, and which is, by the fifth article of the Bill of Rights of this state, expressly declared to reside perpetually and inalienably in the legislature; which is, perhaps, no more than the enunciation of a general principle applicable to all free states, and which cannot, therefore, be violated so as to deprive the legislature of the power, even by express grant to any mere public or private corporation * * * That is a responsibility which legislatures cannot divest themselves of if they would. This police power of the state extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property in the state. According to the maxim, "*sic utere tuo ut alienum non laedas*," which being of universal application, it must of course, be within the range of legislative action to define the mode and manner in which every one may so use his own as not to injure others." And at page 150:

"There is also the general police power of the state, by which persons and property are subjected to all kinds of restraints snd burdens, in order to secure the general comfort, health, and prosperity of the state, of the perfect right, in the legislature to do which no question ever was, or, upon acknowledged general principles, ever can be made, so far as natural persons are concerned."

It was objected by counsel for the railroad that

this statute was "an attempt to control the obligation of one person to another in matter of merely private concern" (see page 151); and the Court says: At page 152.

"But the argument that these cattle guards at farm crossings are of so private a character as not to come within the general range of legislative cognizance, seems to me to rest altogether upon a misapprehension. It makes no difference how few or how many persons a statute will be likely to affect. If it professes to regulate a matter of public concern, and is in its terms general, applying equally to all persons or property coming within its provisions, it makes no difference in regard to its character or validity, whether it will be likely to reach one case or ten thousand. A statute requiring powder mills to be built remote from the villages or highways, or to be separated from the adjoining land by any such muniment as may be requisite to afford security to others' property or business, would probably be a valid law if there were but one powder mill in the state, or none at all, and notwithstanding the whole expense of the protection should be imposed upon the proprietor of the dangerous business. And even where the state legislature have created a corporation for manufacturing powder at a given point at the time, remote from inhabitants, if in process of time dwellings approach the locality so as to render the further pursuit of the business at that point destructive to the interests of others, it may be required to be suspended or removed or secured from doing harm at the sole expense of such corporation." Citing 7 Cowen 604 and 5 Cowen 538.

And quotes from language of Marshall in 4 Wheaton. 629.

In re Jacobs, 98 N. Y. 98.

This case involves the constitutionality of an act of N. Y. which prohibited cigar making in a tenement house where more than three families lived who lived independently of one another and did their cooking on the premises; but if they did not cook there (though there might have been a half dozen families), or if they lived together, or if there were only three families, no matter what their numbers, the act did not apply. Nor did it apply to the first floor if it was used, or if a part of it was used, for the sale of cigars and tobacco. The act was also limited to New York and Brooklyn.

Upon no theory could it be regarded as a provision for the health or safety of either those engaged in the business or of the general public. And the Court so holds,

At page 110: "Generally it is for the legislature to determine what laws and regulations are needed to protect the public health and secure public comfort and safety, and while its measures are calculated, intended, convenient and appopriate to accomplish these ends, the exercise of its discretion is not subject to review by the courts. But they must have *some* relation to these ends * * * If it passes an act *ostensibly* for the public health and thereby destroys or takes away the property of a citizen or interferes with his personal liberty, then it is for the courts to scrutinize the act, and see whether it *really* relates to and is convenient and appropriate to promote the public health."

(The natural inference from this language is, that if in such scrutiny the Court can see that it is for the public health, etc., then the right of the citizen may be invaded. This under the maxim "*salus populi suprema lex.*" And if there is no interference with a constitutional right the Court will not inquire at all, but will leave the question of reasonableness etc., to the legislature, where it belongs, to be regulated according to the maxim "*sic utere etc.*")

On page 113, the Court says: "That it was not claimed in this case that the manufacture of cigars etc., was harmful."

And following the view in Austin vs. Murray 16 Pick. 121-126, viz: "The law will not allow the rights of property to be invaded under the guise of a police regulation for the promotion of health, *when it is manifest* that such is not the object and purpose of the regulation," hold the New York Act void.

Watertown vs. Mayo 109 Mass. 315.

The Court decided that the statute, there in question, was a lawful exercise of the police power of the state, using the following language in a portion of its opinion:—

"All rights to the use and enjoyment of property secured by the Constitution of the United States or of this commonwealth, are subject to regulations under that power known as the police power of the state, which, like the power of taxation, is necessary to its

existence, and which is implied in the idea of free civil government."

"It is defined by Blackstone to be that power which concerns 'the due regulation and domestic order of the kingdom, whereby all individuals of the state, like members of the well governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood and good manners, and to be decent, industrious and inoffensive in their respective stations.'

4th Blackstone Com., 162.

"It has its foundation in that maxim of all well ordered society, which requires every one to use his own so as not to injure the equal enjoyments of others having equal rights of property. Laws passed in the legitimate exercise of this power are not obnoxious to constitutional provisions, although in some measure interfere with private rights merely because they do not provide compensation to the individual whose liberty is restrained. He is presumed to be rewarded by the common benefit secured.'

"*The law most wisely interferes to the protection of the public health by preventing in advance threatened and probable injury. Exposure to danger is itself an injury.* Nor as a police regulation is it essential that its provisions should be applicable to all parts of the common-wealth."

Coe vs. Schultz 47 Barb. 65.

An injunction was prayed against the Metropolitan Board of Health from discontinuing the business of plaintiff, viz: manufacturing superphosphate of lime, which, in the opinion of the Board, was a nuisance.

The plaintiff claimed that it would be taking his property without "due process of law."

The injunction was denied by Sutherland, J., who held that the abatement of a nuisance without judicial proceeding was due process of law.

Commonwealth vs. Alger, 7 Cush. 53.

This was an indictment against the defendant for a breach of the statute of Mass., establishing the commissioner's lines, so called, in the Harbor of Boston, by erecting a building, and maintaining a wharf over and beyond those lines in said harbor. The facts were, that the defendant was for more than 30 years the owner of land on 4th Street in South Boston. The land in question bounded on the arm of the sea lying between Boston proper and South Boston, in and through which the sea ebbs and flows from a bay above, called South Bay. Defendant had partially constructed a wharf on his property, but in the meantime the legislature of Mass., enacted a law proscribing and limiting the building into the sea of any wharf or other obstruction beyond a certain line which had been established by commissioners. Defendant claimed the law in question unconstitutional. Held, by the Supreme Court of Massachusetts constitutional.

From the language and decisions in the foregoing cases it would seem hardly necessary for us to cite other cases illustrating our contention that the

subject and object of the Utah statute are within the scope of the police power. It relates to a question of health, and, as remarked by the Utah Court, it is confined to those departments of the industries affected which are peculiarly dangerous. It is therefore manifest that it was intended as a health regulation, primarily, and for the general welfare of the whole people by preventing a burden that would otherwise come within a few years or months.

Counsel's contention that to be valid a police regulation must affect and be for the benefit of the *whole community*, is correct only in the sense that the whole community is affected and benefited by protecting a part. Few laws reach directly the whole community. We have seen no decision holding that a law must reach and affect directly every citizen.

Nor is it necessary as contended by counsel that because two industries resemble in some particular, that all regulations concerning one must apply to the other. The mere fact that two men are employers does not require that all laws shall affect them equally.

On such a test few laws, if any, could stand. Indeed, we will be surprised if Counsel can name any statute that affects equally every person in the state. A search through the statute books for such a law will show the error of such contention, for compilations of statutes are little more than a collection of what would be called "special legislation" under Counsel's

contention. Each law is designed, and necessarily so framed as to correct some particular evil or to enforce some particular right. While, as a whole, the statutes furnish fair protection against wrong, each statute by itself covers but a small field and directly affects but few persons.

In *ex parte* Smith et al, 38 Cal. 710, the Court speaks of the necessity of enacting statutes to remedy a particular evil and which must, of necessity, apply only to the particular class of persons committing the offense. The Court pertinently remarks that few statutes affect every citizen and person in the state, and that if the contention of counsel prevail, three-fourths of the statutes of the state would be erased.

To the same effect are the following cases.

Field J. in Railway Co. vs. Mackey 127 U. S. 205-208-209.
Budd vs. New York 143 U. S. 517.
State vs. Coal Co. 36 W. Va. 832.
Dent vs. West Virginia 129 U. S. 124.
Leep vs. Railway Co. 58 Ark. 407.
Mayor vs. Miln. 11 Peters 139.
Brimm vs. Jones 11 Utah 200, lately affirmed by this Court. 165 U. S. 180.

Nor is it necessary, even where they are engaged in business of the same general description, that the regulation shall apply to both. For instance a stage line or steamboat line resemble a railroad in the matter of its general business, and foundries and blast furnaces resemble railroads in the matter of danger

of fires from sparks, but a law applying only to railroad companies making them liable for damages caused by fires from sparks, was lately held by this Court to be consistent with the XIVth Amendment.

S. L. & S. F. R. R. Co. vs. Mathews, 165 U. S. 23. etc., and the many cases there reviewed.

Nor is the contention correct that a police regulation cannot apply to the individual to prevent him doing a thing which is harmful to himself. To sustain this contention counsel must assert the unconstitutionality of all laws relating to the use of opium.

(Ah Lim vs. Territory, 1 Wash. St. 159.)

Sunday Laws, (Hennigton vs. Georgia, 163 U. S. 299, 304-8), and the many illustrations there given.

The same case in 90 Ga. 396, 397, 399.

Inter-marriage of whites with other races.

Cooley's Const. Lim. (5th Ed) 483, Note 1, citing many cases.

And the various laws affecting drunkards and intoxicating liquors.

Devine vs. Scott, 34 Ind. 67.

And the line of statutes which do not affect the health or personal safety of the persons affected by them, but which are intended for his personal welfare. Such are the laws prohibiting the right to waive the benefits of the exemption laws by the head of a family.

Curtis vs. O'Brien 20 Iowa 376.

Denis J, in Kneetle vs. Newcomb 22 N. Y. 250. Holding that the borrower cannot waive the benefits of the usury laws. Bosler vs. Rheems 72 Pa. St. 54. The laws of some states punishing attempts to commit suicide.

The statutes of frauds of limitations, conveyances etc., approach very close to this line.

To the above might be added many instances in which the Courts have upheld, as constitutional, laws which are designed to protect the individual against his own act. The fact that he is *sui juris* does not shut him off from the benefits of such laws. The State still retains an interest in his welfare however reckless he may be. The whole is no greater than the sum of all the parts, and when the individual health, safety and welfare are sacrificed or neglected the State must suffer. Counsel cites no authority, but expresses his opinion, in support of his contention that laws regulating the speed of railroad trains and horses are designed only for the benefit of others than those in charge. The driver does not and cannot "separate himself from the public," as counsel claims, by his reckless conduct. If he is injured the natural result is that he becomes a burden upon the public. Apart from humane considerations this threatened burden is sufficient to justify such protection to the individual against his will. The conten-

tion of counsel that such laws can apply only to lunatics, children and the like, and never can reach persons who are *sui juris* is not supported by reason or authority, and is in direct conflict with the cases above cited and those referred to in the latter part of this argument.

The argument that since an employee may assume certain risks and be prevented from recovering damages from his employer by civil action, that the employee may also represent the State and waive its right to punish a violation of its police regulations forbidding that risk, is not sound. If the State could part with this power, which it cannot do (Stone vs. Miss. 101 U. S. 814), it would not delegate it to one so reckless.

The contention of counsel (page 12 of his brief) that a police regulation can be directed only at a business "affected with a public interest" cannot be made seriously. No health regulation that we can now call to mind and few police regulations of any description are directed at a business affected with a "public interest," as that phrase has been defined and applied by the Courts. Such regulations when made usually refer to matters of *wages, charges or compensation*, and have been justified on the ground that the business is affected with a "public interest;" and some Courts have said that matters of wages or compensation can-

not be regulated unless the business is affected with a "public interest."

The business of mining and smelting are matters of very great and vital interest to the State of Utah. Many of the towns and a very large per cent of the population of the State are dependent upon these industries for their living.

If the legislative declaration can have such effect the business of "mining, milling, smelting or other reduction of ores * * are * * declared to be for the *public use*, and the right of eminent domain may be exercised in behalf thereof." (Laws of Utah of 1896, page 316.)

If the widespread importance of their continuance or the right to enjoy this franchise of eminent domain has the effect of bringing these classes of business within the definition of those affected with a "public interest," then it would seem that those conducting the business are subject to legislative regulation for that reason alone.

Munn vs. Illinois 94 U. S. 113.

Budd vs. New York, 143 U. S. 517.

Georgia Banking Co. vs. Smith, 128 U. S. 179.

Tiedeman's Police Powers Sec., 179.

But the case at bar does not involve the matter of wages or compensation in any respect. The object and effect of the Utah Statute is to provide for the *health* and *safety* of those engaged in the business,

and by protecting them and preserving their ability to work and support themselves and families to save the public the burden of their support.

The case of United States vs. Martin 94 U. S. 400, cited by counsel under this head does not seem to support his contention that the statute here does not treat of a subject within the police power. It is true the Court in that case says that statutes regulating wages and the like are not now in vogue; but speaking of the subject of the hours of labor as affecting the health and ability of employees to labor say:

"There are some branches of labor connected with furnaces, foundries, steam or gas works where the *labor and the exposure of eight hours a day would soon exhaust the strength of a laborer and render him permanently an invalid.*" The Court thus takes notice of the dangers to health and safety of certain kinds of labor, and of the limit of human endurance. The Utah Legislature and Court were dealing with a subject where the dangers where even greater by reason of the place of work and the foul air and poisonous substances surrounding the laborer, and the other unhealthful features mentioned by the Utah Court.

The brief quotation from Sec. 178 of Mr. Tiedeman's work is not a full, fair or accurate statement of the law. The full force or weakness of this attempted declaration of the law cannot be properly seen without reading the whole of the section. The course of reasoning upon the subject there discussed

is not clear or satisfactory. Without attempting a review of that section we call attention to the defects in the statement of the law as given at the close of the section, in this: that it purports to be a statement of the law in all cases whereas it can apply only where questions of health and safety and general welfare are not involved. Cases of "frauds and trespasses" are not the only exceptions to the rule. All cases affecting the health and morals of the people are exceptions also. And in every case where a private contract comes in conflict with such laws *the contract must give way*

An illustration of our contention that the terms of the contract in a strictly private contract, and even as to the hours of labor, can be so regulated, is that presented in the case of 163 U. S. 299 (*supra*) where the right to labor on Sunday is denied. Under such laws clerks and employees of all kinds are prevented from contracting to work more than six days in the week. We feel that Mr. Tiedeman's opinion upon this question, unsupported by authority, is directly in conflict with the many cases we have cited wherein the statutes regulating the terms of private contracts have been upheld. Mr. Tiedeman is the first we have known to contend that the police powers were confined to questions of "fraud and trespass."

We can see no application of the quotation from Boyd vs. United States (page 21 plaintiff's brief), for

there is nothing in the record to show that the Utah statute was passed with undue haste or that objections to it have become developed by time and the practical application of the law. On the contrary it is a matter of public and general knowledge in the State of Utah of which the Utah Court might properly take notice that in the enactment of this law the legislature had before it the Act of Congress donating land for a hospital for those who succumbed to the dangers of mining; the clause in the State Constitution enjoining legislation for the health and safety of miners; the discussion of this clause and of this particular bill before its passage both in the daily press and in the legislature; the investigations and reports of legislative committees as to the effect upon the health of underground miners and employees in smelters of long hours of work; the statistics so obtained showing that where such employees worked ten or twelve hours per day the usual result was that such employee was "leaded" or otherwise disabled, and was compelled to lose from one fourth to one third of the days in each month, in a hospital or under medical care and became prematurely old and disabled. And that with these matters thoroughly and at length discussed and considered this statute was enacted by unanimous vote of the State Senate and by over two-thirds of the House. As to objections which have developed later, we have heard of none. The

law has received the general approval of both employers and employees. The only violation of its provisions since its enactment are those of plaintiff in error.

SECOND.

Plaintiff's second contention (brief page 21) is but another form of stating his first and third. While in its statement it would appear that plaintiff claims a right *as a citizen of the United States*, no circumstance is stated indicating that any right is claimed which depends upon any statute or treaty of the United States, or based on his Federal citizenship. The claim of plaintiff of the right "to pursue unmolested a lawful employment in a lawful manner" is but an other form of stating that if this right be denied he would be deprived of his "liberty" or "property" without "due process of law," or the "law of the land," or that he is denied the "equal protection of the law"—all being expressions of the same meaning so far as they can be made to apply to the case at bar.

The plaintiff states that he is a citizen of the State of Utah. The statute in question relates only to the people of Utah. He is not affected differently from any other employer of labor in underground mines or in smelters, etc.

It has been held that the Federal Constitution has no application to statutes of the several states un-

less such statutes encroach upon one of the powers expressly surrendered to Congress, or is in direct violation of some constitutional restriction upon the state. This has be held in many of the cases above mentioned, and to the same effect are:

License Tax cases, 5 Wall. 462.

U. S. vs. DeWitt, 9 Wall. 41.

And after the adoption of the XIVth Amendment it was held that no change in this respect was made or intended by that amendment. To this effect are:

Slaughter-house Cases, 16 Wall. 36.
Stone vs. Miss., 101 U. S. 814.
U. S. vs. Cruikshank, 92 U. S. 542.
Barbier vs. Connelly, 113 U. S. 27.
Mugler vs. Kansas, 123 U. S. 633.
Butchers Union vs. Crescent City Co. 111 U. S. 746.
Beer Co. vs. Mass., 97 U. S. 501.
Fertilizing Co. vs. Hyde Park, 97 U. S. 659-667.
Powell vs. Penn., 127 U. S. 678.
New Orleans Gas Co. vs. Louisiana L. Co., 115 U. S. 650.
Patterson vs. Kentucky, 97 U. S. 501.

But, for the purposes of this discussion we will assume that the XIVth Amendment is not confined to the subject wich induced its adoption, and that it be given the full scope of applying to all citizens of the United States, and as a new protection of the rights of all citizens against legislation by the states denying or abridging any right which properly belongs to the citizen of this country. This is certainly all that counsel can claim for it.

What then are the rights of such person? By the adoption of the Constitution and its amendments it was not intended to change our system of civilization. The maxims, "*sic utere tuo ut alienum non leadas*," and "*salus populi suprema lex*" were not abolished.

When the Constitution speaks of "liberty" and "property" it does not refer to the liberty and property of the savage, but as enjoyed by a *member of civilized society*. It was not intended that after its adoption no man should be restrained from using his liberty or property to the detriment of himself, his neighbor or of the public.

In speaking of these rights and the limitation upon them Chief Justice Shaw says in Com. vs. Alger 7 Cush. 84:

"We think it a settled policy growing out of the nature of well ordered civil society, that every holder of property, however absolute and unqualified his title, holds it under the implied liability that its use may be so regulated that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. All property in this commonwealth, as well in the interior, as that bordering on the tide waters, is derived directly or indirectly from the government, and held subject to those general regulations, which are necessary to the common good and general welfare. Rights of property like all other social and conventional rights, are subject to such reasonable limitation in their enjoyment as will prevent them from being injurious, and to such reasonable restraints and regulations, by law, as the

legislature under the government and controlling power vested in them by the Constitution, may think necessary and expedient."

As Dunbar J. says, in the case of Ah Lim vs. Territory (1 Washington State, at page 165):

"It is common to indulge in a great deal of loose talk about the *natural rights* and *liberties*, as if these were terms of well defined and unchangeable meaning. *There is no such thing as an absolute or unqualified right or liberty guaranteed to any member of society.* Natural rights and liberties of a subject are relative expressions and have relative or changeable meaning * * * The State has an interest in the health of its citizens, and *has a right to see to it that its citizens are self supporting.* * * It is compelled to maintain hospitals for its sick, and poor houses for its indigent and helpless, and surely it ought to have no small interest in, and no small control over, the moral, mental and physical condition of its citizens. If the State concludes that a given habit is detrimental to either the moral, mental or physical well being of one of its citizens to such an extent that it is liable to become a burthen upon society, it has undoubted right to restrain the citizen from the commission of that act, and fair and equitable consideration of the rights of other citizens make it not only its right but its duty, to restrain him."

To the same effect is the language of many Courts and law writers.

It is therefore apparent that the Constitution in referring to "liberty" and "property" referred to the liberty and property which are subject to regulations for the protection of the health, safety and gen-

eral "welfare of the whole people of a State or any individual within it." Subject to such regulations a citizen has the right to engage in any "lawful calling in a lawful manner." He may practice medicine (if he can comply with the numerous regulations which are held to be constitutional), or law (if he possesses the qualifications, moral as well as intellectual, and complies with the regulations and statutes), or in mercantile pursuits he may choose his favorite branch and follow it (if he procures a license, when that is required, and confines his sales to articles which are not prohibited), or if of inventive turn, he may obtain and sell patent rights (provided he does not take notes in forms prohibited by statute), or he may employ labor as a manufacturer or in other industries (if he does not compel them or contract with them to work for him on Sunday), or, in more humble station, he may own teams and wagons and may drive them on the streets at any time (unless he is engaged in a business where he is limited to certain hours or to certain streets) In short, while he is free to choose his calling and employ his labor or other property in any lawful calling, it is and must be subject to regulations which may in the particular case seem to interfere with a "liberty" or "property" but which are essential to the health and safety and the general welfare of himself as well as his neighbor and society in general.

None of the cases cited by counsel are in conflict with the rule as above stated.

The language of Justice Field in the Slaughter-house cases (16 Wall. 97) and in the Butcher's Union vs. Crescent City Co. (111 U. S. 746) recognizes and emphasizes this limitation upon liberty and property. Wherever the "right to pursue a lawful calling" is referred to will be found the reservation: "*in a lawful manner*" or "*in any manner not inconsistent with the equal rights of others,*" or "*without injury to his neighbor.*" If such use of "liberty" or "property" (and we cannot doubt, but on the contrary insist, that labor and the right to labor are within the meaning of the terms "liberty" and "property" and are subject to regulation as other property is) may result in an injury to his neighbor or may result in the person using them becoming a burden upon the public, it is "not only the right but the bounden and solemn duty of the state" to prohibit such use or to regulate it so as to make it safe and healthful.

Several cases from the State Courts are cited by counsel under this head with the claim that they involve the exact question at issue in the case at bar. To us the similarity is not apparent, for by careful reading it will be seen that each case cited involved statutes which made classifications which were not consistent with the subject of the Act, and could not be considered as health regulations.

Whether it be better or safer to reserve to the Courts the power to review the action of the legislature in the matter of its classification of subjects, or to leave such questions to the discretion of the legislatures which come from and go back to the people at short intervals, has been a question upon which very able Judges and Courts have been unable to agree. But in cases where the Courts have retained the right to determine whether the maxim, "*salus populi suprema lex*" was properly invoked, such Courts have uniformly adhered to the following rules or tests, viz:

1st. Is a right protected under the Constitution affected by the Act in question? If no clear and well defined Constitutional right is destroyed the inquiry by the Court stops immediately.

2nd. If such right is affected, then, is the Act one which was honestly intended or calculated to benefit or advance the health, safety or general welfare of the people? If it is manifestly intended for some other purpose, (as in the Jacobs case or the Marx case) the Courts which hold to this right of judicial review, have held that the Act cannot stand. But where the Court can see that the Act has some relation to these subjects of health, safety, or general welfare, and are susceptible of such construction, the benefit of the doubt, if there be one, is given to the State, and the Act is permitted to stand.

Other Courts have concluded that it is the province of the legislature, under our system of government, to determine whether the law is appropriate to some feature of the health, safety or general welfare, and have refused to disturb their decisions.

But under either view of this power of the Court to supervise the Acts of the legislature, no Act has been declared void unless it was *manifestly* designed for some purpose other than the health or safety of the citizen.

In the cases cited by counsel, where the statutes were held void there was not in any one of them a reasonable relation to the health or safety of the classes affected or of the public in general.

Thus in the Kubeck case (85 Cal. 274), an ordinance of the city prevented a contractor with the city from contracting to pay wages on any other basis than eight hours per day. It applied to all labor employed by such contractor, whether it consisted in driving teams, paving streets, carrying water, keeping time, clerks, whether done in the open air and sunlight or in closely confined quarters. By thus failing to classify and to make it applicable to some particular branch of industry that was dangerous to health or safety, if there were such, the ordinance had no apparent relation to the health of those affected. It was also confined to labor employed by a

contractor with the city, and did not apply to other contractors who might be employing laborers to perform precisely the same class of work under the same conditions. In thus attempting to fix the rate or basis of wages, in making it affect only one of a class of contractors who were similarly situated, and having no feature of a health or safety regulation in its term, its history or its possible effect, it was held void by the California Court.

In re Eight Hour Law 39 Pac. Rep. 328 (Colo).

From the report of this decision, or opinion, rather (if it can be so dignified) we cannot determine to a certainty the matter passed upon by the Colorado Supreme Court. From the language of the Court it would seem that the proper steps had not been taken by the legislature to entitle them to the aid of the Supreme Court. And while the report indicates that a second application was made to the Supreme Court, the length of the opinion given (some nineteen lines) would suggest that the legislature was still lacking in its method of appealing to the wisdom of the Court upon so serious question.

But whether for lack of formality in its presentation or because of press of business, the Colorado Court did not give to the question the serious thought and consideration that are necessary to give its opinion weight in illustrating the question presented in the case at bar. In view of the decisions of this

Court in the cases cited in this brief, we feel that if the Colorado Court had considered the question submitted to it with the care that is bestowed in contested cases, and especially if their attention had been called to the cases we have cited, that it might have arrived at a different result than that announced in the nineteen line decision cited.

It is true that the law submitted to that Court contained some provisions which should have been omitted if the law was designed solely as a *health* regulation, for as the proposed act read it applied not only to *all* labor in mines (whether on the surface or underground) but also to all factories, etc. The Court probably took notice of the fact that there is a material difference in point of health and safety between the work in *underground mining* where the laborer is working under the constant strain of working in the dark or by dim candle light and is breathing the foul gases from powder smoke and the like, and the work done in placer mines or surface working where none of these dangers to health and safety exist. And the Court probably took notice of the differences in the effect upon health and safety of the various kinds of business which may properly be classed as "factories." Some may be of the character referred to by this Court in the case of U. S. vs. Martin in which even eight hours work would be exhausting and dangerous and result in making the laborer un-

fit for self support and a burden on the people, while other factories may be engaged in that line of business where there is no mental or physical strain or danger and in all respects consistent with ten or twelve hours work per day. In this latter view the proposed law of Colorado would not be considered as a health regulation, and would in that respect resemble the Nebraska and Illinois statutes. Not being able to distinguish and therefore justify it as a health regulation, in that it was not confined to a particular feature of the business which was unhealthful, and since it was made to apply only to one—or rather three specific occupations which could not be separated from other kinds of business so far as health was concerned, the Court might have considered the proposed law as coming under the rule announced in Nebraska and Illinois. Such seems to have been the view of the Colorado Court, as they adopt the situation and decision of the Nebraska Court as the basis of their ruling.

In re House Bill No. 107 39 Pac. Rep. 431.

The opinion of the Colorado Court in this, as in the matter above mentioned is deprived of value by the lack of a definite or any statement of the terms of the proposed statute. Conceding to it all that can be claimed, it is an approval of all the cases cited in the opinion reported, upon an *ex parte* and uncontested matter.

In the case of Leep vs. Railway Co. (58 Ark. 407) an Act requires rail-road and rail-road construction companies to pay wages of employe when he is discharged. Counsel for plaintiff does not criticise this classification. The Arkansas Court held the statute valid. They justify the classification on the ground that it applies to all who may come into that business (439).

The case of State vs. Goodwill (33 W. Va. 179), prohibited owners of mines and manufactories from paying wages in anything but lawful money. The Court recognizes the extensive scope of the police power, but cannot approve that act which, dealing with the question of wages, is confined to only two of the many industries where wages are paid. It was in no sense a regulation for the health or safety of those affected.

Godcharles vs. Wigeman, 113 Pa. St. 437, was a case where Wigeman had accepted and actually used certain orders for coal given him by his employer in payment of wages, and then attempted to repudiate his act by suing for cash, claiming that the statute entitled him to his wages in cash, notwithstanding the fact that he had already asked for and accepted the coal. The Court held him to his acceptance of the coal in payment of his wages. The only error committed by the Court in that case was in going outside of that case and outside of the proper

jurisdiction of a Court and denouncing the statute as void in all cases, because of its policy; and in denouncing all legislation which attempts to regulate the character or terms of private contracts. We have seen by the cases we have cited that such regulation, as exemption laws, lien laws, liquor laws, Sunday laws and the like are constitutional, and the Pennsylvania Court in earlier and later decisions has so recognized them. In holding that Wigeman in a civil action would be held to his acceptance of coal for wages and not be permitted to recover double pay for his work the court certainly did justice; but in denouncing all legislative interference with private contracts made by parties who are *sui juris*, the Court departed from precedents established by that Court and this.

The same Court in the later case of Powell vs. Com. 114 Pa. St. 265, take a more reasonable view of the power of the Court to review the policy of police regulation and say: (at page 295).

"To refuse recognition of the power, in a given case, because, in the judgment of some, the legislature though acting within its proper sphere, may have mistaken the public necessity for a law prohibitory in character, is to make the individual judgment superior to that of the legislature to which the people in their sovereign capacity have delegated the law making power."

As the Court in this latter case expressly approve the decision and views of the lower Court, we would

call this Courts' attention to the opinion of the lower Court found at 114 Pa. St. at pages 265-282. This opinion contains a very able and extensive review of many cases in which police regulations affecting individual rights have been held constitutional.

After reading the well considered opinion in the Powell case (114 Pa. St. 265), we feel that the Pennsylvania Court might not have held or expressed the views contained in the *dicta* in the Godcharles case had that case directly involved the constitutionality of the wage statute. But even if those views can be approved we do not see that they can apply to the case at bar. The Pennsylvania statute was not in any sense a regulation for the health or safety of the individual or the public, but was confined to the question of wages and the kind and manner of their payment; while the Utah statute is strictly a health and safety regulation—a subject by *all* Courts held to be within the police power. The Pennsylvania wage statute was also limited to a few of the many wage earners, thus making a classification disapproved by some of the Courts. Other differences might, perhaps, be mentioned, but the above are sufficient to distinguish that case from the case at bar.

We have referred to the Godcharles case at some length for the reason that it was the foundation for all the other cases especially relied upon by counsel for plaintiff in error.

In Com. vs. Perry, 155 Mass. 117, the statute in question prohibited employers from making deductions in *wages* for defects in weaving. The statute not only affected the question of wages, but in a most unfair manner by compelling the employer to pay full wages for inferior work, and thus changed the contract between the parties which provided that deduction should be made for inferior or defective work (p. 118-119).

The Massachusetts Court did not criticize the manner of classifying, though the statute affected but one class of wage earners and employers. On the contrary the right to so classify is specially mentioned by that Court. At page 121, they say:

"It might well be held that if the Legislature should determine it to be for the best interest of the people that a *certain class* of employes should not be permitted to subject themselves to an arbitrary fine, it might pass a law to that effect."

From this language it would seem that that Court recognizes the propriety and constitutionality of legislative protection for *certain classes of employes* who, by reason of their needy condition, require protection from the imposition of employers.

Shaver vs. Penn. Ry. Co. 71 Fed. 931. A statute of Ohio prohibited agreements or stipulations of persons in, or about to enter the employ of railroad companies *waiving* (p. 936) right to damages for personal injuries, and declaring such agreements and stipula-

tions void. The act applied only to employment for railway companies and did not affect employees or employers in the many other industries where the conditions were the same.

As a member of a Relief Department which was largely supported by the defendant the plaintiff agreed that if he should accept its benefits he should thereby "release all claims for damages against said defendant." (See statement of terms of agreement by the Court, p. 933). The plaintiff after accepting several hundred dollars from the Relief Department, commenced suit for damages for the injuries on account of which he had received the benefits. He was free either to sue, or to accept the benefits as settlement. The Court held him to his acceptance. It was an application of the rule that where claims for damages are unliquidated the parties may agree on such settlement or compromise as they see fit, and having voluntarily made it and accepted its fruits they will be held to it. Judge Ricks held the statute to be class legislation and void as extending only to one class of a large number similarly situated.

The statute was not a health or safety regulation in any sense. We cannot see that the Ohio statute was necessarily involved in that decision, for by its terms it did not prevent a *settlement* of claims for damages, but only prohibited a *waiver* of such claims. Had the Court there held that the statute had no ap-

plication to that case the decision would have been correct, and fully justified under the rule that Courts will not seek an opportunity to denounce statutes as unconstitutional.

In re Tiburcio Parrott 1 Fed. 481.

This was the case where the constitution and statutory law of California preventing corporations from hiring or employing Chinese was brought into question. This law and the constitution of California was declared void, as being in controvention of the Constitution of the United States and the statutes and treaties of the general government. The Court also held, such treaties and law respecting Chinese belong to the United States Government and not to the state. The Court could not see in that law any elements of a police regulation, but on the contrary, thought that by depriving Chinese of an opportunity to earn a living was to make them vagrants, paupers and criminals, and thus make it burdensome on the state to provide for such paupers or vagrants, etc. It was therefore not only an infringement of a power surrendered to congress, but possessed no features of a law for the health, safety or general welfare of those affected, or of the public.

THIRD.

Under the third contention of Counsel it is claimed that the *plaintiffs' employe* is deprived of equal pro-

tection of the law, and is deprived of his liberty or property without due process of law. Ordinarily Courts are called on to pass upon the rights of the parties to the action only. Realizing the hesitancy with which Courts subject to the constitutional test, the Statutes of a State, it might be regarded as showing lack of confidence in his own cause when plaintiff assumes this position of guardian for his employe.

Ordinarily those of the plaintiffs' situation do not devote such time and energy and expenditure of money in retaining the ablest Counsel as have been necessary in this case, in the protection of the employes' interests.

This philanthropic interest deserves reward and we consent that he may use the cloak of the employe if Counsel feels that it will give his cause a better appearance. But in this exchange of courtesies the employe of Utah does not wish to be bound by what may be done in his name by the plaintiff; for the statute in question has in point of renewed health and ability to work full time each month proved entirely satisfactory to the laborers and the taxpayers.

But to consider plaintiffs contention as to the effect of this statute on the employe.

Counsel argues that though it may be a health regulation it is unconstitutional because "*it restricts the earnings of the employe to what he may be able to obtain from his employer for eight hours' work, and prevents him*

from earning the additional pay which he would be entitled to if he worked more than eight hours a day."

Even if this were the necessary effect of the law it would be a proper health regulation, for by preserving to a citizen his ability to work and support himself is not only humane but is preventing a burden on the people.

But such is not the effect. The various kinds of labor in connection with mines and mining camps is a matter of general knowledge. The work underground is but a part. The removal of *debris* taken from underground, the sorting of ores, the preparation of timbers, sharpening tools and the various other kinds of labor necessary to be done on the surface in connection with evey mining enterprise furnish ample opportunity for more hours of work for the over ambitious miner. Our judgment is that after the exhaustion of eight hours work underground the miner will be inclined to partake of all the sunshine, fresh air and rest available.

But there is nothing in the Utah statute to prevent his working as many hours as he may wish on the surface.

And were the question of wages or earning capacity proper to be considered in this case the contention of counsel would be fully answered by the common experience of such employes. When working ten and twelve hours each day, and seven days in the week (for mining and smelting are industries

conducted under such conditions that work cannot ordinarily be suspended one day in the week)—miners and smelter employes find that they become what is commonly called "leaded," and otherwise disabled from work. The time lost in hospitals and the expense of medical bills make serious inroads on their earnings. Under the present system of eight hours per day at such work, leaving them free to rest and recuperate, the usual experience is that they can put in the full thirty days each month. In this the judgment of the legislature has been fully sustained.

The argument that the legislature *may* limit the hours to a less number is unsound, and has been so pronounced by this Court in the case cited by Counsel (Munn vs. Illinois, 94 U. S. 113), where the Court says in answer to a like contention:

"That the power may be abused * * is no argument against its existence. For protection against abuses by Legislatures the people must resort to the polls, not the Courts."

Under this head Counsel cites various cases which he insists support his contention that the plaintiff (or his employe) has been deprived of liberty or property without "due process of law" or the "law of the land." The error of Counsel in attempting to apply the cases cited to the case at bar is illustrated by the misquotation from the case of Jones vs. Reynolds 2 Tex. 251 (page 37 plaintiff's brief). As quot-

ed it reads: "and this means general public law, binding upon all members of the community under *all* circumstances etc." As announced by the Texas Court it reads: "under *similar* circumstances," and such is the language and idea expressed by the many able Courts and Judges in defining and applying the phrases, "due process of law" and the "law of the land." It is true that Judges have at times given definitions which were strictly correct as applied to the particular case but were not full statements perhaps if applied to a different state of facts. In applying decisions cited, this Court has well said: "The opinion of a Court must always be read in connection with the facts upon which it is based."

Doyle vs. Insurance Co., 94 U. S. 538.

Insurance Co. vs. Morse, 20 Wall. 456.

With this rule in mind *it will be found that no case cited by counsel can be considered as applying to the case at bar.*

The Jacobs case (98 N. Y. 98) was admitted not to be a health or safety provision.

Low vs. Rees Printing Co., 41 Neb. 127.

The plaintiff, a printer, commenced his action against his employer, the defendant company, for wages, alleging that he was working under a contract by which he was to be paid at the rate of thirty cents per hour. That the defendant had him work 11 hours per day, and that there was due him for the

first eight hours $2.40; for the ninth hour 60c, for the tenth hour $1.20, and for the eleventh hour $2.40. His claim for the extra work per hour for the hours in excess of eight per day being based on the statute of Nebraska, which provided:

Sec. I. "That eight hours shall constitute a legal day's work for *all* classes of mechanics, servants and laborers throughout the State of Nebraska, *excepting* those engaged in farm and domestic labor."

Sec. 8 "Any employer or corporation working their employes over the time specified in this Act, shall pay as extra compensation double the amount per hour as paid for previous hour."

The Act is held unconstitutional in that it is class legislation, the classification not being made with regard to particulars which are peculiar to the industries included, or different from those excluded. It was not and could not be claimed to be a health regulation for it included many industries where ten or twelve hours or more per day would not be injurious, and it excluded industries or labor in which the need of rest was as great as in many of those included. The convincing proof that it was not a health or safety regulation is found in the provision that permits as many hours as desired at increased wages.

Ritchie vs. People. 155 Ill. 98. The statute of Illinois was almost as sweeping as the Nebraska statute. It included many industries in which there would be no injurious result from working more than

eight hours per day. And like the Nebraska statute it was not broad enough to include many kinds of labor which were as exhausting as many of those included. The Court recognizes the right to enact police regulations as to the character and terms of private contracts, but says that such legislation is subject to review by the Courts to determine whether it be on a "reasonable basis." The Illinois eight hour statute in question not meeting the approval of the Court on that test it was held void.

Millett vs. People. 117 Ill. 294. The statute was confined to mine owners and was held to be an arbitrary and unreasonable classification and regulation in matters where the industry did not differ from many others. It required scales, books, etc., to be kept at the expense of the owner; and prohibited contracts with employes to be made on any other basis than the weight of the coal mined.

Frorer vs. People. 141 Ill. 171, like the preceding case was confined to one class of employers whose business in the particular affected by the statute was not different from that of other employers. It prohibited persons engaged in mining or manufacturing business from paying wages in "store orders." While disapproving this kind of regulation as to mines the Court says: "*In all matters relating to mining * * wherein they differ from other industrial branches, the Legislature has the constitutional power whether any, and if any,*

what, statutes shall be enacted for their welfare and necessarily affecting them alone."

The Utah statute comes within this description.

Braceville Coal Co., vs. People. 147 Ill. 66 was, like the preceding case, limited to one of many enterprises similarly engaged. The Court could see no reason why corporations more than partnerships or individuals should be required to pay wages weekly.

Ramsey vs. People. 142 Ill. 380 involved a statute which was held subject to the same objections as in the other Illinois cases.

People vs. Marx 99 N. Y. 377. The statute *prohibited* sale of oleomargarine. It was held to be manifestly to prevent competition with butter producers, and in no sense a provision for the health, safety or welfare of the people.

State vs. Sheriff of Ramsey Co. 51 N. W. 112. The statute in question was a smoke regulation, but by its terms made such exceptions as to take from it the features of a health provision.

People vs. Gilson 109 N. Y. 389 involved a statute prohibiting giving presents with goods sold. It was claimed to be a provision in the interest of health or morals, but the Court was unable to see that it could be so considered under any possible construction.

The case of State vs. Loomis 115 Mo. 207 is, perhaps, one of the most instructive of the cases cited by counsel as it contains a review of most of the

cases especially relied on by counsel for plaintiff, and we call special attention to the dissenting opinion of Barclay J. at page 220. The majority of the Court hold void the statute there regulating the manner of paying wages of but one class of employes not differing from any other in the respect affected. The majority hold that the classification must be on a reasonable basis. In its discussion of the subject the Court suggests that regulations applying to mines alone are proper when concerning the health and safety of those employed.

The opinion of Barclay J. is upon the view expressed by many of the judges and Courts in the cases which we shall hereafter cite, viz: that it is as safe to leave it to the legislatures to determine the matter of classification for police regulation as for the Courts to pass upon it.

And when we consider the intention of the framers of the Constitution with regard to the location of powers, as explained to us by Chief Justice Marshall, Chief Justice Shaw, Justice Barbour and Redfield, and the many able opinions of other judges and Courts it would seem clear that this power of providing regulations for the health, safety and welfare of the people was intended to be left to the discretion of the legislature of the States. And when we compare the opposing views of Courts as to the propriety of laws and classifications made as the basis of such regulations,

it would seem convenient and as safe to leave it with the legislatures who are better situated to know the needs of the people.

To illustrate this conflict between the Courts as to what are reasonable classifications and regulations:

The decision in People vs. Marx 99 N. Y. 377 seems in direct conflict with Com. vs. Powell 114 Pa. St. 265.

The decision in Frorer vs. People 141 Ill. 171, and in the similar cases cited are met by a contrary view in Leep vs. Railway 58 Ark. 407 and in State vs. Coal Co., 36 W. Va., 802, Hancock vs. Yaden 121 Ind., 369 and State vs. Brown 18 R. I. 16.

The *dicta* in Godcharles vs. Wigeman and the private opinions of judges who criticize the policy of regulating the affairs and contracts of persons who are *sui juris* is fully met by the decisions of the Courts in the cases cited below in which the law was held to be valid.

Beer Co. vs. Massachusetts, 97 U. S. 25, in which it is decided affirming Bartemyer vs. Iowa, 18 Wall. 129, that a State law prohibiting the manufacture and sale of intoxicating liquors is not repugnant to any clause of the constitution of the United States, and that if the public safety or the public morals require the discontinuance of any manufacture or trade, the legislature, in the exercise of the police power, may require its discontinuance even as against a corporation chartered for the express purpose of carrying it on.

Patterson vs. Kentucky, 97 U. S. 501, where the same principle is applied to an act forbidding the sale of an article for which a patent had been granted by the United States: Stone vs. Mississippi 101 U. S. 814, where the same principle was applied to the charter of a lottery company:

Barbier vs. Connelly, 113 U. S. 27, and Soon Hing vs. Crowley, Id. 703, which hold that a municipal ordinance prohibiting washing and ironing and public laundries and wash houses within certain hours is a valid exercise of the police powers.

Blair vs. Forehand, 100 Mass. 136, holding that an Act providing that any person might kill any dog not licensed and collared, as provided by the statute, wherever found, was a valid exercise of the police power.

Bertholf vs. O'Reilly, 74 N. Y. 509, (30 Am. R. 323) deciding after a full discussion of the extent of the police power that a statute enacting that the lessor of premises, with the knowledge that they are to be used for the sale of intoxicating liquors, shall be liable for damage caused by the act of one intoxicated by liquor sold there, is constitutional.

Woods vs. State, 36 Ark. 36 (38 Am. Rep. 22), holding that under the statute forbidding the sale of ardent spirits by any person for any purpose without a license, a druggist cannot lawfully sell such spirits, even as medicine upon the prescription of a physician —citing numerous cases to show that the right of the legislature in the exercise of the police power of the State to regulate or prohibit the sale of intoxicating liquor has been settled by the Court beyond controversy.

State vs. Mugler, 29 Kan. 252 (44 Am. Rep. 643), which holds that a law prohibiting the brewing and

selling of beer, applied to beer lawfully manufactured before the law took effect.

Davis vs. State, 68 Ala., 58 (44 Am. Rep. 128), where it is decided that a statute declaring it unlawful, within certain counties, to transport or move after sunset and before sunrise any cotton in the seed, was constitutional.

Donnelly vs. Decker, 58 Wis., 461 (46 Am. Rep. 637), in which the court held that a law providing for the drainage of lands, whenever the town Supervisors shall deem it conducive to public health, and for the payment of damages, and for the assessment of the whole cost on the land benefitted, was constitutional as an exercise of the police power.

Hawthorne vs. People, 109 Ill. 302 (50 Am. Rep. 610), decided that a law requiring operators of butter and cheese factories on a co-operative plan to give bond for faithful accounting for property received for a manufacture, is not unconstitutional.

Fry vs. State, 63 Ind. 552 (30 Am. Rep. 238), holding constitutional a statute regulating the issue and sale of tickets by railroad companies.

State vs. Ah Chew, 16th Nev. 50 (40 Am. Rep. 488), sustaining statute prohibiting the sale of opium.

Commonwealth vs. Waite, 11th Allen, 264. This case decides that the legislature have the right, in the exercise of the police power, to make it a criminal offense to sell pure milk mixed with pure water.

Holding that a borrower can not waive the benefits of a usury law.

Boler vs. Rheems, 72 Pa. St. 54.

The law declares that payment in part of an

ascertained debt shall not extinguish it, although the parties agree that it shall do so.

Ogborn vs. Hoffman, 42 Ind, 439.
Smith vs. Tyler, 51 Ind. 512.
Markel vs. Spitler, 28 Ind. 488.

A party will not be allowed to contract to waive the benefit of homestead or exemption laws.

Maloney vs. Newton, 85 Ind. 565.
Kneettle vs. Newcomb, 22 N. Y. 249.
Curtis vs. O'Brien, 20 Iowa 376.
Moxley vs. Ragan, 10 Bush. 156 (19th Am. Rep. 61.)

A debtor cannot waive stay of execution by contract.

McLane vs. Elmer, 4 Ind. 239.
Develin vs. Wood, 2 Ind, 102.

By the English law a seaman cannot, by contract, waive his right to wages. Kay Shipmaster and Seaman 626.

Parties cannot, by contract, bind themselves in advance not to resort to the Court for the redress of wrong.

Bauer vs. Samson Lodge, 102 Ind. 262.
Dugan vs. Thomas, 79 Me. 221.

A contract providing that a party shall not remove a cause to the federal court is void.

Insurance Co. vs. Morse, 20 Wall. 445.
Doyle vs. Continental Ins. Co., 94 U S. 535.

A party will not be allowed to contract without limitation that he will not engage in a particular business.

Taylor vs. Saurman, 110 Pa. St. 3.

A statute may require parties to insert in a promissory note the words "given for a patent."

Herdic vs. Roessler, 109 N. Y. 127;
New vs. Walker, 108 Ind. 365.

Priority in the allowance and payment of claims may be regulated by legislation.
U. S. vs. Fisher, 2 Cranch 358.

A lien for miner's wages may be made superior to the royalty due the owners of mine from the lease or operators.
Warren vs. Sohn, 112 Ind. 213.

Churchman vs. Martin, 54 Ind. 380, wherein it was held that a statute prohibiting parties from contracting to pay attorney's fees is constitutional.

"The authorities to which we have referred and to which it would be no great task to add others, prove that the law making power of the State does have authority over the right to contract.
Hancock vs. Yaden, 121 Ind. 370.

To the above list might be added the laws forbidding a white person from contracting marriage relations with a negro or person of other than the caucasian race; laws preventing the loaning of money at a rate higher than a certain per cent; laws giving land-lords liens; laws giving employes, laborers and servants a prior lein over other creditors when the business of a person, firm or corporation has been suspended or attached by the creditors of such firm, person or corporation; laws not allowing bankers the benefit of the statute of limitation against depositors; contracts or agreements that future disputes shall be settled by arbitration instead of in the Courts; statutes prohibiting claimants from testify-

ing in actions against estates of deceased persons in their own behalf, or in support of their claim, etc., etc.

We think the foregoing cases are sufficient answer to the main contention made by plaintiff here, viz: That his right to contract in private matters cannot be regulated or interfered with by statute. To so hold would be to hold unconstitutional all the statutes above mentioned. That contracts may be so regulated in matters which do not affect the health or personal safety is amply shown by the cases cited. While courts have differed as to the policy and expediency of statutes relating to wages or compensation, no decision can be found holding unconstitutional a statute which reasonably related to health.

That these regulations may extend not only to the character of the work, but also govern the terms with reference to the number of days or hours an employe may work or be employed to work, is clear from the principles announced in the foregoing cases, but directly upon this question are the following cases:

Com. vs. Hamilton 120 Mass. 383, holding constitutional a statute prohibiting the employment of women in any manufacturing establishment more than ten hours a day, or sixty hours per week.

Approved *in re* House Bill 1230, 40 N. E. 713.

People vs. Havenor, 149 N. Y. 195. "The physical welfare of the citizen is a subject of such prim-

ary importance to the state and has such a direct relation to the general good as to make law tending to promote that object proper under the police power. * * *

"Every man's liberty and property are to some extent subject to the general welfare, as each person's interest is presumed to be promoted by that which tends to promote the interest and welfare of the public. * * *

"It is in the interest of the state to have strong, robust, healthy citizens, capable of self support, or bearing arms, and adding to the resources of the country. Laws to effect this purpose, *by protecting citizens from over-work* and requiring a general day of rest to restore his strength and preserve his health, have an obvious connection with the public welfare. Independent of any question relating to morals or religion, the physical welfare of the citizen is a subject of such primary importance to the state, and has such a direct relation to the general good as to make laws tending to promote that object proper under the police power, and hence valid under the constitution, which presupposes its existence and is to be construed with reference to that fact.

"The statute under discussion tends to effect this result because it requires persons engaged in this kind of business, that takes many hours each day, to refrain from carrying it on during one day in seven. This affords an opportunity, recurring at regular intervals for rest, needed by employer and employee, and the latter may not have the power to observe the day of rest without the aid of legislation. As Mr. Tiedeman says in his work on Police Powers: 'If the law did not interfere, the feverish, intense desire to acquire wealth * * * * in-

citing a relentless rivalry and competition would ultimately prevent not only the wage earner, but likewise the capitalist and employer themselves from yielding to the warnings of Nature and obeying the instincts of self preservation by resting periodically from labor.' "

And to the same effect in passing upon the validity of the Georgia Sunday Law, is the case of Hennington vs. Georgia 163 U. S. 299 *et seq.*

CONCLUSION.

From the foregoing it will be seen that counsel for plaintiff is not justified in his claim that under the cases cited by him the statute in question would be unconstitutional. If its character, purpose and effect were kept in mind, viz: a provision for the health and safety of the employe and the welfare of the public resulting therefrom, applying only to that branch of the industries which is detrimental to health,—we would not fear the result were the question of its constitutionality submitted to any of the Courts named in plaintiff's brief.

Believing the Utah Statute to be free from Constitutional objections, we ask that the judgment of the Supreme Court of Utah in these cases be affirmed.

Very respectfully submitted,

CHAS. J. PENCE.

JOHN H. MURPHY.

Attorneys for Defendant in Error.